SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-798

FRANCISCO ENTERPRISES, INC., a corporation,
Petitioner,

vs.

EDWARD J. KIRBY, PETER T. SEXTON, RONALD LOCKYER and JAY D. CALDISS,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

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OPINION BELOW

The opinion of the United States Court of Appeals, Ninth Circuit, No. 71-1813, on appeal from the United States District Court for the Northern District of California is reported at 482 F.2d 481 and may be found in Appendix 1 of the Petition for Writ of Certiorari. Petitioner's petition for rehearing was denied by the United States Court of Appeals on August 20, 1973.

JURISDICTION

The jurisdiction of this Court was invoked under the provisions of section 1254(1) of Title 28, United States Code.

QUESTIONS PRESENTED

While the instant petition for a writ of certiorari frames the "question presented" as being whether a prior adjudication by a state court should be a res judicata bar to a 42 U.S.C. § 1983 action in a federal district court, respondents submit that viewed in the facts and context of this case the actual question presented also inevitably involves whether a United States District Court may exercise appellate review over, and enjoin, a final state court judgment.

STATUTES INVOLVED

The constitution and statutes involved are Article XX, Section 22 of the California Constitution dealing with the state constitution's establishment of the California Department of Alcoholic Beverage Control as a judicial tribunal; sections 23090 through 23090.7 of the California Alcoholic Beverage Control Act[1] dealing with the review of California Department of Alcoholic Beverage Control adjudicatory decisions by way of a writ of review (certiorari) in the California Supreme Court or the California Court of Appeal; and sections 1067 through 1077 of the California Code of Civil Procedure dealing with state appellate review by way of writs of review (certiorari) to inferior judicial tribunals. Also pertinent are 28 U.S.C. § 1257 which vests only in this Honorable Court the jurisdiction to review final judgments of state courts, and 28 U.S.C. § 2283 which prohibits federal district courts from enjoining state court judgments.

California Constitution, Article XX, Section 22

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein pro-

1. California Business and Professions Code, Division 9, §§ 23090 through 23090.7.

vided and in accordance with the laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. *The Department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuaunce of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude.*" (Emphasis added)

California Alcoholic Beverage Control Act,
Sections 23090, 23090.2, 23090.3 and 23090.5

Under California statutory and constitutional law, review of Department of Alcoholic Beverage Control adjudicatory decisions is by way of appeal to the constitutionally created[2] California Alcoholic Beverage Control Appeals Board and thence by petition for a writ of review (certiorari) in the California Supreme Court or the California Court of Appeal:

"23090. Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order. The application for writ of review shall be made within 30 days after filing of the final order of the board."

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2. Article XX, section 22 of the California Constitution establishes the Alcoholic Beverage Control Appeals Board as an appellate tribunal to review adjudicatory decisions of the Department of Alcoholic Beverage Control. If the Appeals Board affirms the Department's decision, the licensee may then petition the California Supreme Court or the California Court of Appeal for a writ of review (certiorari).

"23090.1 The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the board to certify the whole record of the department in the case to the court within the time specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the whole record of the department as certified to by the board."

"23090.2 The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:

(a) The department has proceeded without or in excess of its jurisdiction.

(b) The department has proceeded in the manner required by law.

(c) The decision of the department is supported by the findings.

(d) The findings in the department's decision are supported by substantial evidence in the light of the whole record.

(e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

Nothing in this article shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."

"23090.3 The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department. The board, the department, and each party to the action or proceeding before the board shall have the right to appear in the review proceeding. Following the hearing, the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for

further proceedings before or reconsideration by the department."

"23090.4 The provisions of the Code of Civil Procedure relating to writs of review shall, insofar as applicable, apply to proceedings in the courts as provided by this article. A copy of every pleading filed pursuant to this article shall be served on the board, the department, and on each party who entered an appearance before the board."

"23090.5 No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case."

"23090.6 The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, or decision of the department, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, rule, or decision of the department subject to review, upon the terms and conditions which it by order directs."

"23090.7 No decision of the department which has been appealed to the board and no final order of the board shall become effective during the period in which application may be made for a writ of review, as provided by section 23090."

STATEMENT OF THE CASE

Petitioner was[3] a corporate on-sale general public premises licensee of the California Department of Alcoholic

3. The revocation of petitioner's alcoholic beverages license was placed into effect on October 1, 1970, after the California Supreme Court had denied a hearing and stay order.

Beverage Control and as such exercised the privileges of selling alcoholic beverages at retail for consumption on its licensed premises.

On June 8, 1967, an accusation was filed with the California Department of Alcoholic Beverage Control (hereinafter referred to as the Department) against petitioner's alcoholic beverages license. The accusation was pled in two (2) counts and alleged in substance that continuance of petitioner's alcoholic beverages license would be contrary to public welfare and morals within the meaning of Article XX, Section 22 of the California Constitution and sections 24200(a), 24200(b) and 25601 of the California Alcoholic Beverage Control Act, in that petitioner had permitted and allowed the licensed alcoholic beverages premises to be used as a disorderly house and a place to which people resorted for purposes injurious to the public morals, health and safety.

Count I of the accusation alleged in numerous subcounts that on various dates the petitioner-licensee had permitted on the licensed premises overt sexual acts and conduct between male patrons and between a male patron and an employee of the petitioner-licensee. Count II alleged that petitioner-licensee's president had in his possession for sale or distribution two (2) simulated rubber penises.

Petitioner filed a Notice of Defense and requested a hearing on the charges.

On September 18 and 19, 1967, and on May 27, 1968, adjudicatory hearings were held on the accusation before the Department;[4] petitioner was represented by counsel, evidence was adduced, and the proceedings were reported.

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4. The California Department of Alcoholic Beverage Control is a California state court of limited jurisdiction. Calif. Constitution, Art. XX, Sec. 22; Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal.2d 238 (1959); Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545 (1946).

On July 18, 1968, the Department filed its decision which found the allegations of the accusations to be true and ordered the revocation of petitioner's alcoholic beverages license on Count I and a 30 day suspension of the license on Count II.

Petitioner then filed an appeal with the California Alcoholic Beverage Control Appeals Board (hereinafter referred to as the Appeals Board), the appellate tribunal established by the California Constitution[5] to review adjudicatory decisions of the Department.

On June 18, 1970, after receiving written and oral argument, the Appeals Board filed its opinion wherein it affirmed the Department's decision as to Count I and, concluding that the possession of the simulated rubber penises by petitioner's president was not grounds for disciplining the license, reversed the Department's decision as to Count II.

On July 17, 1970, petitioner filed a petition for a writ of review (certiorari) in the California Court of Appeal, First Appellate District. The California Court of Appeal denied petitioner's petition for a writ of review.

On July 29, 1970, petitioner petitioned the California Supreme Court for a hearing.

On September 10, 1970, the California Supreme Court denied petitioner's petition for a hearing.

On October 1, 1970, the revocation of petitioner's alcoholic beverages license was placed into effect.

On November 1, 1970, petitioner filed its complaint for injunctive relief in the United States District Court for the Northern District of California seeking to have the respondents restrained and enjoined from enforcing the Department's decision revoking petitioner's alcoholic beverages license.

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5. California Constitution, Article XX, Section 22.

On November 17, 1970, respondents filed in the District Court their opposition to a preliminary injunction; and on November 23, 1970, respondents filed their notice of motion and motion to dismiss the action on the grounds: that the United States District Court was without jurisdiction to exercise appellate review of a state court judgment, that the District Court could not entertain a collateral attack against a state court judgment by way of an injunctive relief action, that the final state court judgment was a res judicata bar to the federal action, and that petitioner's remedy was by way of review in the United States Supreme Court.

On March 29, 1971, the United States District Court dismissed the action.

On April 15, 1971, petitioner filed its Notice of Appeal to the United States Court of Appeals, Ninth Circuit.

On July 19, 1973, the United States Court of Appeals filed its decision affirming the judgment of the United States District Court.

ARGUMENT

1. The California Department of Alcoholic Beverage Control Is a California State Court of Limited Jurisdiction.

Petitioner contends that the California Department of Alcoholic Beverage Control is merely an administrative agency and that its adjudicatory decisions are not those of a state court nor res judicata as to federal court actions. Such is simply not so.

The California Department of Alcoholic Beverage Control is *not* a legislatively created administrative agency, but is a California state tribunal created and established directly by the California Constitution and vested with judicial powers by the California Constitution. *California*

Constitution, Article XX, Section 22. The California courts have recognized that the Department of Alcoholic Beverage Control is a state constitutional tribunal exercising adjudicatory powers. *Covert v. State Board of Equalization*, 29 Cal.2d 125, 131-132, 173 P.2d 545 (1946); *Martin v. ABC Appeals Board & Richards*, 53 Cal.2d 238, 241-242, 340 P.2d 1 (1959); *Dept. of Alcoholic Beverage Control v. Superior Court*, 268 Cal.App.2d 67, 70 (1968); *Kirby v. Superior Court*, 275 Cal.App.2d 975 (1969).

The position of the California Department of Alcoholic Beverage Control as a court of limited jurisdiction is further recognized by the review procedures of Department adjudicatory decisions. The California Superior Court (general trial court) is prohibited from reviewing, restraining, enjoining, or interfering in any way with adjudicatory decisions of the Department. Section 23090.5, *California Alcoholic Beverage Control Act*. Review of Department adjudicatory decisions is by way of a writ of review (certiorari) in the California Supreme Court and in the California Court of Appeal. Section 23090 *et seq.*, *California Alcoholic Beverage Control Act*.

As succinctly set forth by the United States District Court below:

> ". . . .
>
> The foregoing legislative and case history indicates that the present Department of Alcoholic Beverage Control has succeeded to the status formerly held by the State Board of Equalization in matters of liquor control. Although there are no California cases directly in point, it is clear to this Court that the California courts do consider the Department of Alcoholic Beverage Control to be a state court of limited jurisdiction, *Martin v. Alcoholic Beverage Control Appeals Board*, 52 Cal.2d 238 (1959), and similar in nature to

other constitutionally created California state courts of limited jurisdiction such as the California Public Utilities Commission and the Workmen's Compensation Appeals Board. *Department of Alcoholic Beverage Control v. Superior Court*, 268 C.A.2d 67, 73 Cal. Rptr. 780 (1968).

. . . .

Since the Department of Alcoholic Beverage Control is a state court of limited jurisdiction, this District Court cannot exercise appellate review over its judgment, not entertain a collateral attack by way of an action for injunctive relief. *Flynn v. State Board of Chiropractic Examiners, supra* (418 F.2d 668), *Wilke & Holzheiser, Inc. v. Reimel, supra* (266 F.Supp. 168 N.D. Calif. 1967), *Rooker v. Fidelity Trust Company, supra* (263 U.S. 413). Plaintiff's remedy after the Department of Alcoholic Beverage Control's decision became final by the denial of plaintiff's petition for a writ of review in the California Court of Appeal and in the California Supreme Court was that of appeal or petition for certiorari in the United States Supreme Court. *Wilke & Holzheiser, Inc. v. Reimel, supra.*"

(*Francisco Enterprises, Inc. v. Kirby et al*, U.S.D.C. Northern Dist. of Calif., No. C-70-2372; see Appendix 2 to Petition for Writ of Certiorari)

This status of the California Department of Alcoholic Beverage Control was examined and affirmed by the United States Court of Appeals, Ninth Circuit, below:

"The district court's dismissal on the above grounds was predicated upon a determination that 'the California Department of Alcoholic Beverage Control is a state court of limited jurisdiction.' The district court made such a determination after examination of relevant California law. Martin v. Alcoholic Beverage Control Appeals Board, 340 P.2d 1 (1959); Covert v. State Board of Equalization, 173 P.2d 545 (1946).

> We agree with the district court's conclusion that California law considers the Department of Alcoholic Beverage Control to be a state court of limited jurisdiction. *See Martin and Covert, supra,* and that res judicata principles precluded its entertaining the federal complaint."
>
> (*Francisco Enterprises, Inc. v. Kirby et al,* 482 F.2d 481, 484-485)

And just recently in a similiar case to this one, the United States Court of Appeals, Ninth Circuit, reaffirmed the foregoing status of the California Department of Alcoholic Beverage Control as a California state court of limited jurisdiction whose adjudicatory decisions are not subject to attack or review in the federal district courts. *Kuzinich dba The Pink Poodle v. Kirby, et al,* Nos. 72-1131 and 72-1132, December 11, 1973:

> "On Appeal from the United States District Court for the Northern District of California
>
> Before CHAMBERS, DUNIWAY and KILKENNY, Circuit Judges.
>
> PER CURIAM:
>
> The judgment of dismissal is affirmed. See *Francisco Enterprises, Inc. v. Kirby, et al,* 482 F.2d 481 (9th Cir. 1973)."

2. A Final State Court Judgment May Be Reviewed Only by the United States Supreme Court. Res Judicata Bars a Party from Relitigating His Claims in a Federal District Court.

This is *not* an *England v. Louisiana Board of Medical Examiners* (375 U.S. 411) case. Petitioner did not initially enter the federal district court seeking relief from threatened or actual state action only to have the federal court abstain and send the petitioner to the state courts first.

On the contrary, state proceedings were initiated against petitioner's alcoholic beverages license and, in proceedings extending over three (3) years,[6] the facts and issues—including petitioner's federal constitutional claims—were heard and litigated in the California state courts. Then, after the Department of Alcoholic Beverage Control's adjudicatory decision had become final when the California Court of Appeal and the California Supreme Court denied petitioner's petition for a writ of review, petitioner, instead of seeking review and relief in this Honorable Court, filed an injunctive relief action in the federal district court seeking to have the Department's decision enjoined.

As aptly put by the Court of Appeals below:

> "Res judicata principles have been consistently applied to preclude parties from relitigating federal constitutional claims in a federal district court subsequent to an adverse determination on the merits of such claims by a state court of competent jurisdiction. The sole recourse for the losing litigant is by appeal or writ of certiorari to the United States Supreme Court."
>
> (*Francisco Enterprises, Inc. v. Kirby, et al,* 482 F.2d 481, 485)

28 U.S.C. § 1257 vests only in this Honorable Court the jurisdiction to review final state court judgments. Petitioner's recourse from the final adverse state judgment against it was by appeal or petition for certiorari to this Honorable Court. Petitioner may not relitigate its claims in the federal district court and have the federal district court review and enjoin the state court judgment.

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6. The accusation against petitioner's alcoholic beverages license was filed on June 8, 1967. The California Supreme Court filed its order denying petitioner's petition for a hearing on September 10, 1970.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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